**IN THE HIGH COURT OF BOMBAY**

Writ Petition No. 1109 of 2010 and Notice of Motion No. 325 of 2010

Decided On: 23.06.2010

Appellants: **Sangita Shah Parent/Guardian of Ativ Shah Poonam and Ors.**
**Vs.**
Respondent: **State of Maharashtra through the Department of School Education and Sports and Ors.**

**JUDGMENT**

**S.C. Dharmadhikari, J.**

1. Rule. Respondents waive service. Respondent Nos. 1 to 8 who are the contesting Respondents waive service. It is not necessary to issue notice to Respondent Nos. 6 to 12. The pleadings are complete and, therefore, by consent of parties, Rule is made returnable forthwith.

2. The Petitioners are parents of minor students who have appeared for the 10th standard examination conducted by the Council for Indian School Certificate Examinations (Respondent No. 5) (hereinafter for short referred to as "ICSE"). The Petitioners have appeared from the secondary schools impleaded as Respondent Nos. 6 to 12 in this Petition. These examinations have been conducted in March 2010. The son/daughter of each of the Petitioners has passed the standard 10th examination conducted by Respondent No. 5 Council.

3. The first Respondent is the State of Maharashtra. The second Respondent is the Principal Secretary, Department of School Education and Sports, State of Maharashtra, whereas Respondent No. 3 is the Additional Secretary, Department of School Education and Sports. Respondent No. 4 is the State Board established for the State of Maharashtra under the Maharashtra Secondary and Higher Secondary Education Boards Act, 1965 (hereinafter for short referred to as "1965 Act").

4. The Petitioners are challenging the Government Resolution dated 25th February 2010 and the Corrigendums dated 14th and 16th June 2010. These Government Resolutions/Orders are issued by Respondent Nos. 1 and 2. The Petitioners urge that in Maharashtra schools offering Secondary Education i.e. Standards IX and X are affiliated to several Education Boards and particularly the Respondent No. 4, Respondent No. 5 Council and the Central Board for Secondary Education. There is another Board, namely, the International General Certificate of Secondary Education (IGCSE). These Boards conduct the Xth standard examinations which are popularly known as Board Examinations. It is common ground that in the State of Maharashtra institutions affiliated to Respondent No. 4 Board imparting higher secondary education i.e. standard XI and XII are designated as Junior Colleges as per the Maharashtra Secondary Higher Secondary Education Boards Regulations, 1977 (hereinafter for short referred to as "said Regulations"). The Junior Colleges in the State of Maharashtra affiliated to Respondent No. 4 outnumber other Institutions offering higher secondary education in affiliation with other Boards. The Petitioners' case is that nearly 5000 Schools and Junior Colleges are affiliated to Respondent No. 4 Board while there are only l168 Higher Secondary Schools which are affiliated to Central Board of Secondary Education and Respondent No. 5. It is their case that on account of more seats in Junior Colleges affiliated to Respondent No. 4 being available, students passing their Secondary School Certificate (10th standard) from various other Boards including Respondent No. 5 apply for admission to Junior Colleges affiliated to Respondent No. 4 for Higher Secondary Education.

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5. The contention of the Petitioners is that Regulation 79 of the said Regulations provides for eligibility of students for admission to Junior Colleges. It is then urged that under this Regulation and particularly Sub­regulation (1) of Regulation 79 students who pass the ICSE and CBSE examinations are also eligible for admission to the Junior Colleges affiliated to Respondent No. 4 Board. Further, Regulation 79(1) as amended with effect from 18th March 1996 states that students who have passed the Secondary School Certificate Examinations of any statutory Board in India can be admitted to the first year of Junior Colleges if they have offered and passed in minimum five subjects with English as one of the subjects.

6. It is then contended that for admission to the Junior Colleges affiliated to Respondent No. 4 Board, percentage of the aggregate of marks obtained by students in all subjects in their qualifying examinations for standard X forms the sole basis for determining the rank and the merit position of the student for admission to the Junior College. The number of total marks of which the percentage is calculated may vary from Board to Board, for example Respondent No. 4 Board has a total of 600marks for six subjects and Respondent No. 5 Council has a total of 700 marks for seven subjects. It is also pointed out that Respondent No. 5 has a similar Regulation. Regulation 79(1) prescribes a policy of granting marks to students who pass in five of the seven subjects for which the examination is conducted. It is also pointed out that the admissions to the Junior Colleges affiliated to Respondent No. 4 Board are regulated solely by its own Regulations. There is no involvement of any nature of Respondent No. 5 Council. As such, while calculating percentage of marks obtained by a student of ICSE Board, the aggregate of the marks obtained by students in all seven subjects is taken into consideration, as is presently done. Respondent No. 4 Board has been carrying on the admission process by applying this method.

7. Our attention has been invited to the fact that since 2009­20 10 the first Respondent has made On­line centralized admission process mandatory for students applying for admission to Junior Colleges in Maharashtra. Accordingly, students who wish to apply for admission to Junior Colleges in Maharashtra are required to submit a form, after indicating the percentage of the aggregate marks obtained by them in the qualifying examination i.e. SSC, ICSE, CBSE and their preferences. Prior to the impugned Government orders, the percentage of marks was computed on the basis of the total marks which are assigned to the subjects in the examination.

8. It is then urged that Respondent No. 4 in order to achieve uniformity forwarded a proposal to the State Government for amending the said Regulations. The State Board addressed a detailed letter to the State Government in this regard on 27th January 2010 and 2nd February 2010. It is pointed out to us by the Petitioners that on 4th February 2010 the State Government directed the 4th Respondent Board to publicize the amendment forwarded to it in newspapers and invite suggestions and views from the public. On 6th February 2010, the 4th Respondent Board is stated to have published the text of the amendment through various newspapers and Radio as also the Electronic Media. It is stated that suggestions were invited from students, parents, educationist, educational institutions. These were required to be forwarded to the Board upto 15th February 2010. The Board in its affidavit states that a repeat publication was done on 13th February 2010 and 16th February 2010. After receipt of the suggestions and views, the Board forwarded the details on 22nd February 2010 to the School Education Department of the State Government of Maharashtra. It is pointed that the first Government order came to be issued on 25th February 2010.

9. It would be convenient to reproduce the said order:

Regarding to apply "Best Five" Scheme since March 2010 to the Secondary School Certificate Exam (Std. 10th) conducted by Maharashtra State Secondary and Higher Secondary Education Board.

Govt. of Maharashtra
School Education and Sports Department
Govt. Order No. SSC/2010/(25/10)/Umshi­2
Mantralaya, Extension Building, Mumbai­32
Date: 25th Feb. 2010

Read: The Letter No. RM/Exam­6/582 dated 27th January 2010 and No. RM/Exam­6/1295 dated 22/2/2010.

Introduction

In the State of Maharashtra the examination of 10th Std. Is conducted by Maharashtra State Secondary and Higher Secondary School Education Board, Pune, CBSE, ICSE and other Boards. Excluding the Maharashtra State Secondary and Higher Secondary Education Board, in some other boards, the marks obtained only in 5 subject out of a total 6 subjects of the students appeared and considered to decide their passing and the percentage of the marks and the result is declared as per that. But for the 10th Std. Exam conducted by Maharashtra State Secondary and Higher Secondary Education Board the passing of the students appearing for it, is decided on the basis of the marks obtained for the total 6 subjects and as per that the percentage of the marks is shown in the marksheet. With a view to achieve uniformity the State Board has submitted a proposal for "Best of Five" to the Government. The Board had been instructed to revise the said proposal by the Government after calling for opinion of the students, guardians, education experts, teachers unions and of different social unions. Accordingly the revised proposal of the Board had been received by the Govt. It was under the consideration of the Govt. to take the action on the proposal after considering all aspects of the revised proposal presented by the Board.

Govt. Order:

The Govt. is giving the approval to apply the "Best Five" scheme subject to the following terms and conditions for the students who appeared for secondary school certificate exam (10th Std.) conducted in March 2010 by Maharashtra State Secondary and Higher Secondary Education Board and for the students who will appear for it at the years ahead.

1) The regular students who will appear for the Secondary School Certificate Exam (10th Std.) for all the subject at time and also all the repeater students who will appear for this exam for all the necessary subjects at a time, will be eligible for this scheme.

2) It will be necessary for the above said students to pass in all the subjects as per the present Rules (Necessary subjects/classified subjects).

3) The marks and the class of all subjects will be shown in the marksheet.

4) While showing the percentage of the marks, excluding the classification subject out of 6 necessary subjects, the percentage of best marks of 5 subjects will be shown.

5) And to obtain the admission in the science branch of 11th std, the present condition of minimum 40% of the marks in science subjects will be applicable as before.

6) The other concessions declared by the State Board will be applicable as before (e.g. Condonation for the passing in the subject, grace marks, marks for sports concession, the parameters and rules of the joint passing, the concessions for the Special needy students, ATKT).

7) The above said scheme will be applicable to the Secondary School Certificate Exam since March 2010.

2. The above said provisions should have to be included in Maharashtra Secondary & Higher Secondary Education Boards, Rules 1977 Rule 79(1) by using the powers received as per Maharashtra Secondary & Higher Secondary Education Board Act, 1965 Section 36(3).

3. The above said Govt. Order had been made available on www.maharashtra.gov.in website of the Govt. of Maharashtra and its computer code is 20100225191410001.

In the name and the order of the Governor of Maharashtra.

Sd/
S.P. Khargade
Addl. Secretary
Govt. of Maharashtra

10. It is indicated in the affidavit of the State and the 4th Respondent that there was an inadvertent error in the order dated 25th February 2010 and, therefore, a correction was sought by addressing a letter dated 13th April 2010. On 12th May 2010, the Board reminded the Government about the correction and thereafter the 1st Respondent sought details of amendments both in Marathi and English which were e­mailed to the Government.

11. It is stated that certain clarifications were given by the 4th Respondent Board in relation to award and prizes and scholarships in view of the amendment.

12. On 7th June 2010, this Writ Petition challenging the Government Resolution dated 25th February 2010 came to be filed in this Court. It was moved before us on 10th June 2010 and the following ad­interim order came to be made:

1) Respondent Nos. 1 to 4 want time to file affidavit in reply. Time granted. However, we make it clear that respondent Nos. 1 to 3 would not commence admission process without seeking permission from this Court. S.O. 18th June 2010.

13. On 14th June 2010, the first Respondent issued the Corrigendum correcting Regulations, namely, Regulations 56, 58 and 59. It is stated that on 16th June 2010 once again a Corrigendum came to be issued and another correction came to be made.

14. It is pointed out that the net effect of the Corrigendum is that Regulations 56, 58 and 59 were to stand amended. The earlier error that Regulation 79(1) was amended is corrected and it was clarified that there is no amendment to the said Regulation. Further, the power of the State Government to sanction the modification to the Regulations is traceable to Section 36(3) and not Section 34 of the 1965 Act which came to be mentioned earlier.

15. It would therefore be necessary to reproduce the further orders/Corrigendums. The same are reproduced hereinbelow:

(A) Corrigendum dated 14th June 2010 reads thus:

Regarding making application "Best Five" Scheme from March 2010 for Secondary School Certificate Examination (Std. 10th) being conducted by the Maharashtra State Secondary and Higher Secondary Education Board.

Government of Maharashtra
School Education and Sports Department,
Government Corrigendum: No. SSC­2010/
(25/10)/HSE­2,
Mantralaya, Annex Building, Mumbai - 400032
Date: 14June, 2010.

Read: 1) Letter No. S.B/Exam­6/582, dt. 27 January 2010 and letter No. S.B/Exam­6/1295, dt. 22.2.2010 of Maharashtra State Secondary and Higher Secondary Education Board, Pune;

2) Government Resolution School Education and Sports Department No. SCC­2010/ (25/10)/HSE­2, dt. 25 February 2010;

3) Letter No. S.B/Exam­6/3093, dt. 30.4.2010 of Maharashtra State Secondary and Higher Secondary Education Board, Pune.

Government Corrigendum:

In paragraph No. 2 of the Government resolution referred to at Sr. No. 2 hereinabove, it should be read as "Section 34" in place of the word, "Section 36(3)" of Secondary and Higher Secondary Education Board Act, 1965 and it should be read as "Rule No. 56, 58 and 59" in place of the word, "Rule 71(1)" of Maharashtra Secondary and Higher Secondary Education Boards Regulation, 1977.

2. The said Government Corrigendum is made available on the website www.maharashtra.gov.in of Maharashtra Government and its computer code No. is 20100614132432001.

By order and in the name of Governor of Maharashtra.

Sd/­ S. P. Khorgade
(S. P. Khorgade)
Under Secretary to the
Maharashtra Government

Copy to:

• The Chairman, Maharashtra State Secondary and Higher Secondary Education Board, Shivaji Nagar, Pune;

• Director, Education (Secondary & Higher Secondary) Maharashtra State, Pune;

• All Divisional Chairman, Maharashtra State Secondary and Higher Secondary Divisional Education Board;

• Director, Maharashtra State Educational Research and Training Council, Pune;

• All Divisional Deputy Directors, Education;

• Director General, Information and Public Relation, Maharashtra State, Mumbai.

• The Principal Secretary, (Higher & Technical Education Department) Mantralaya, Mumbai -32

• Deputy Secretary of the Hon'ble Chief Minister, Secretariate of Hon'ble Chief Minister, Mantralaya, Mumbai.

• Deputy Secretary of the Hon'ble Deputy Chief Minister, Mantralaya, Mumbai;

• Private Secretary of the Minister (School Education), Mantralaya, Mumbai;

• Private Secretary of the State Minister (School Education), Mantralaya, Mumbai.;

• Personal Assistant to the Principal Secondary (School Education and Sports Department), Mantralaya, Mumbai - 32.

• Select File (HSE - 2)

(B) Corrigendum dated 16th June 2010 reads thus:

"Regarding the amendment in the Act pertaining to "Best Five" in the Secondary School Certificate (10th Standard) Examination being conducted by Maharashtra State Secondary and Higher Secondary Education Board, to be made applicable from March, 2010.

GOVERNMENT OF MAHARASHTRA
School Education and Sports Department,
Government Corrigendum No. : SSC­2010(25/10) HSE­2,
Mantralaya Extension Building,
Mumbai - 400032
Date: 14June, 2010.

Read:­ (1) Letter bearing No. S.B/Examination­6/582 dated 27th Januar7y, 2010 and Letter bearing No. S.B/ Examination ­6/766 dated 2nd February, 2010 and Letter bearing No. S.B/Examination/ S .B ./Examination­6/ 1295 dated 23/2/2010 from the Maharashtra State Secondary and Higher Secondary Education Board, Pune.

(2) Government Resolution, School Education and Sports Department No. SSC­20 10(25/10) H.S.E.­2 dated 25th February, 2010.

(3) Letter bearing S .B/Examination­6/3093 dated 30/4/20 10 from the Maharahtra State Secondary and Higher Secondary Education Board, Pune.

(4) Government Letter No. S SC ­2010/ (124/10)/H.S.E. 2 dated 21st May, 2010.

(5) Government Corrigendum, School Education and Sports Department No. ­SSC­2010/ (25/10)/H.S.E.­2 dated 14th June 2010.

Government Corrigendum:­

In Paragraph Number 1 of the Government Corrigendum referred to hereinabove at Sr. No. 5, the words, viz. "Section 36(3)" as mentioned in the Government Resolution referred to hereinabove at Serial No. 2, in place of the words, viz."Section 34" of the Secondary and Higher Secondary Education Board Act, 1965, are kept intact.

By order and in the name of Governor of Maharashtra,

Sd/­ S.B.Khorgade
Under Secretary
Government of Maharashtra

To,

The Chairman, Maharashtra State Secondary and Higher Secondary Education Board, Shivaji Nagar, Pune Director of Education (Secondary and Higher Secondary), Maharashtra State, Pune All Divisional Chairman, Maharashtra State Secondary and Higher Secondary Divisional Education Board. Director, Maharashtra State Educational Research and Training Council, Pune, All Divisional Deputy Directors

16. The Petition was then placed before us and adjournment was sought because an affidavit in reply came to be filed on behalf of the Respondent Nos. 1 to 3. Prior thereto the Respondent No. 4 Board also filed its reply.

17. The learned Senior Counsel appearing for the Petitioners sought time to peruse the affidavits in reply and if necessary file any rejoinder. Leave was sought to amend the Petition which we granted and we issued directions with regard to filing of additional replies/ affidavits and compilations.

18. The Petition has been accordingly amended.

19. As far as the first Respondent is concerned, an affidavit in reply of S.P. Khorgade, Under Secretary, School Education and Sports Department has been filed. In the affidavit which is affirmed on 17th June 2010, it is stated that the Petition is filed after considerable delay because the impugned Government Resolution was published on 25th February 2010. It was widely circulated and available on the internet. Further, the admission process is about to start and therefore the Petition should not be entertained.

20. After referring to the proposals forwarded by Respondent No. 4 Board in paragraph 3 of this affidavit, the deponent states that the State Government noted that 4th Respondent has compared the criteria for passing the SSC examination with the examination system of CBSE Board. Upon this comparison, the Academic Council in its meetings held on 13th October 2009 and 12th January 2010 arrived at a conclusion that while issuing mark list, the Board should mention the percentage of marks scored by the students in Best of five subjects. This decision was taken considering the disadvantage faced by its students. Further, in paragraph 3, the deponent states that the State considered the fact that students appearing for examination conducted by 4th Respondent Board need to be brought at par with students appearing for examinations conducted by other Boards. The opinions received from the public came to be considered and thereafter the sanction was given to the policy of best of five.

21. It is then pointed out as to what necessitated the issuance of the Corrigendums.

22. In paragraph 5 of the affidavit, the deponent states that the Petition is filed without understanding the policy of best of five properly. It is filed on incorrect information and hearsay assumptions. The Petitioners pray for applying the best of five policy to the students of ICSE Board also. It is stated that the impugned policy of best of five is adopted only for issuing mark sheet and certificate and therefore it is entirely the discretion of the 4th Respondent Board whether to adopt this policy and apply this to its own students or not. It is then stated that notices were issued by 4th Respondent Board and the intent to modify the Regulations in question was widely notified.

23. In paragraph 7 of this affidavit, the deponent states that it is relevant to note that there is difference in subjects of examination, marking system, paper pattern, etc. prescribed by SSC, CBSE and ICSE Boards. The relevant Regulations of the Board are referred so also the details of the subjects and it is then urged that CBSE Board adopts marking system for five subjects, SSC Board adopts marking system for six subjects and 4th Respondent Board adopts marking system for seven subjects. The State has placed on record the details of the compulsory subjects and it is urged that if the marking system of all the Boards is compared, it would be seen that SSC and CBSE Board does not provide for 50% marks for internal and external examinations each for compulsory subjects and marking system of ICSE Board gives advantage to its students over students of SSC and CBSE Boards.

24. Thereafter in paragraph 9, it is clarified that Regulation 79(1) is not being amended. Therefore, the allegation in the Petition that the action of Respondent Nos. 1 and 2 is unfair, arbitrary or in violation of Article 21 is denied. It is once again asserted that the said Regulation provides that students from ICSE and CBSE Boards are eligible for taking admission in Schools and Colleges affiliated to SSC Board as ICSE and CBSE Boards do not have the required number of institutions to accommodate their own students, the students from these two Boards as well as other Boards apply for admission to 11th (XIth) standard in the Schools and Colleges affiliated to Respondent No. 4 Board. As there are students from different Boards having different systems of marking, it was necessary to evolve some system for admission which treats all students equally and avoids any unfair advantage or disadvantage to the students of any Board. It is in this light and after considering the views of all concerned that the Government Resolution is issued and therefore it cannot be said that it violates the mandate of Article 14 of the Constitution of India.

25. In the affidavit that is filed on behalf of the 4th Respondent Board, details of the Regulations and communications requesting the State to amend some of them are set out. Further, the Regulation making power of the Board is referred and in paragraph 5A the 4th Respondent points out the different and distinctive examination conducted by the other Boards and states that the average percentage of students appearing in CBSE examination is on the basis of performance of five subjects. The Board therefore outlines the necessity of amending its own Regulations so as to evolve the best of five policy.

26. The Board then deals with the Petition on the basis that it questions the powers of the Board to amend its own Regulations and the manner the same is to be done. Further, the Board's affidavit proceeds on the basis that the Petitioners seek to raise the issue of equivalence which is something only experts in the field can do and it is not for this Court in its jurisdiction under Article 226 of the Constitution of India to go into such question. Once again it asserts the difference in syllabi, the marking systems of the respective Boards and urges that State Board does not cater to a few institutions but to mass education. The Board caters to underprivileged children. Therefore it is in the best position to decide academic issues and that there is no question of violation of mandate of Article 21 of the Constitution as asserted by the Petitioners.

27. After the amendments to the Petition were permitted and the Corrigendums were placed on record, an additional affidavit has been filed on behalf of Respondent No. 1 in which a contention is raised that the provisions of the Maharashtra Secondary and Higher Secondary Education Boards Act, 1965 so also the said Regulations do not contemplate inviting suggestions, objections and view points of the public at large and experts. Ultimately, the State and the Board performs legislative function and principles of natural justice have no place in such an exercise. Yet, Respondent No. 1 meets the allegation that the impugned actions are unfair and arbitrary and asserts that it is devoid of any merit because of the exercise of inviting suggestions and objections of the public being carried out. The attempt is to point out that the decision was not taken hurriedly and in haste but after considering the views of all concerned and well in advance.

28. It is urged that the State Government never intended to unfairly target any category of students but the decision is taken to treat all the students alike and in any event no mala fides can be attributed when the exercise of amendments to the said Regulations is carried out. Therefore, allegation that there is no violation of the mandate of Article 14 of the Constitution has no substance.

29. In paragraphs 9 and 11 of the affidavit affirmed on 21st June 2010, this is what is stated:

9. I deny that the amendment to the Regulations No. 56, 58 and 59 has not been sanctioned by the Government as required Under Section 36(2) of the Act. The Board had submitted a proposal for change in the system of calculation of percentage of marks for issuance of mark sheets. This proposal was comprehensive to include a suggestion to amend the relevant Regulation. The proposal suggested amendment of the said Regulations as well, though the proposal did not specifically says Regulation numbers to be amended. This proposal was sanctioned by the State Government in toto, after applying its mind. Thereafter, the Resolution dated 25­2­2010 was passed. I further say that thereafter on 30­4­20 10, the Board submitted a proposal bringing to the notice of the State Government that there is an erroneous reference to Regulation 79(1) in the Government Resolution dated 25­2­2010 since the regulations proposed to be amended were Regulations ­ 56, 58, 59 and 62. This was an inadvertent error that was brought to the notice of the State Government. Accordingly, on 12­5­20 10, a proposal was submitted to correct the inadvertent error.

xxxx xxxxx xxxxx

11. I say that the Deputy Director of Education has made consequential changes in the process of admission in pursuance to the above referred amendment to the Regulations. Nothing much turns on that.

30. It is not necessary to refer to the additional affidavit filed on behalf of Respondent No. 4 Board because more or less identical pleas have been raised.

31. Upon this material, we have heard the learned Counsel appearing for parties.

32. Mr. Dada, learned Senior Counsel appearing for the Petitioners, contended that the State has all throughout treated all examinations conducted by different Boards as equivalent. It is pertinent to note that Regulation 79(1) has not been amended. He submitted that the actions of Respondent No. 1 in issuing the subject Government Resolution is nothing but an attempt to get over the judgments of this Court rendered in the case of Francisco D. Luis v. The Director, Board of Secondary and Higher Secondary Education, Maharashtra and Ors. : 2008 (8) Bom. L.R. 2892, (Percentile matter) and in the case of Viraj Maniar v. the State of Maharashtra and Ors. (Writ Petition No. 1086 of 2009 decided on 6th July 2009) (90:10 case), while considering identical policy of reserving 90% of the seats for the students appearing for the qualifying examinations conducted by Respondent No. 4 Board. In these decisions, this Court has held that the basis on which the Respondent Nos. 1 to 4 have proceeded is not reasonable but wholly irrational, arbitrary and artificial. While emphasizing that there is a disadvantage to students of 4th Respondent Board in comparison to students of CBSE and ICSE (Respondent No. 5) that the State had carried out identical exercise earlier. However, when their actions were tested before this Court on two occasions, neither the State nor the Respondent No. 4 Board could place any data justifying the alleged classification or reservation in favour of SSC Board students. In such circumstances, it could be safely assumed that to get over these judgments and to give unfair advantage to the students appearing for the qualifying examination of Xth standard from Respondent No. 4 Board that the subject Government Orders/Regulations have been issued. Mr. Dada pointed out to us the affidavits filed in reply and submits that the assumption that the SSC students are suffering or are at an disadvantage is erroneous. He invites our attention to Regulation 79(1) and Regulation 79(6) of the said Regulations and submits that students of statutory and non­statutory Board like ICSE are qualified and held to be eligible for admission. Mr. Dada emphasized that what Regulation 79(1) contemplates is the issue of eligibility for admission. At that stage every student appearing for the qualifying examination of 10th standard from whichever Board is held to be eligible for admission to Junior Colleges (XIth standard). However, this does not guarantee him admission because the test further to be satisfied is of the percentage of marks. He must get the necessary percentage and stand in order of merit so as to enable him to get admitted to the college of his choice. He submits that even when the exercise of amending Regulation was going on as late as after institution of the Writ Petition, the State Government issued a Brochure. He submits that the brochure though titled as an `information booklet', yet, it sets out rules for admission. Inviting our attention to Rule 8 of the said Rules, Mr. Dada submits that Respondent No. 1 had already decided to apply the best of five policy to students appearing for 10th standard examination from Respondent No. 4 Board with effect from March 2010. The subject Government Resolution sets out this decision and that is how Rule 8 came to be inserted in this Brochure. Thus, before the Corrigendums were in place, rules for admission were notified which make it abundantly clear that students appearing for the qualifying examination from other Boards though eligible for admission will not get the benefit of the best of five policy. He had placed before us the fact that the Corrigendums proceed on the basis that there has been some error noticed. However, no amendment was done to the Regulations when Rule 8 was placed in rule book, according to him.

33. Inviting our attention to the Corrigendums, Mr. Dada submits that there has been no consultation with other Boards on amendments to Regulations 56, 58 and 59.

34. Mr. Dada then draws our attention to the compilation handed over by the 4th Respondent and submits that when letter dated 30th April 2010 was addressed by 4th Respondent Board to the 1st Respondent, there was no reference to Regulation 56 being proposed to be amended. No text of the proposed amendments to Regulation 56 came to be appended to the communication from the Board. Mr. Dada submits that although the affidavit of the Board filed earlier refers to letter dated 21st May 2010, such a letter is not placed on record. He invites our attention to the letter bearing No. 3093 dated 30th April 2010 so also pages 33, 39, 40, 42 and 51 of the compilation and submits that even the further communications at pages 52, 54, 55, 56 and 57 of this compilation make no reference to the amendment to Regulation 56.

35. After the Rule was inserted in the rule book and finding that Regulation 79(1) could not have been amended, as an after thought the amendments to Regulations 56, 58 and 59 were proposed. All this, according to Mr. Dada when the Rule was already inserted and made. It is in such circumstances that according to Mr. Dada in the garb of correcting some errors but with undue haste and without giving opportunity to either the Petitioners or the 5th Respondent Board to challenge the proposed amendments that the said Regulations are amended. In the meanwhile, results of the ICSE (5th Respondent) for the X standard examination conducted by it were already declared. There was no occasion for anybody to apply their minds and in such circumstances the Government Resolutions impugned in this Petition are vitiated by total non­application of mind according to Mr. Dada.

36. Mr. Dada questions the entire policy of best of five by urging that this is really not a measure to achieve uniformity. On the other hand, every such step of the 1st Respondent, be it "Percentile" system or the "90:10 Reservation" and the present Best of five policy creates a discrimination between Boards and students and gives unfair advantage to the students appearing through the 4th Respondent Board. Mr. Dada submits that merit takes a back seat and discrimination and inequity is writ large in such policies. He submits that the attempt at classification is totally unreasonable. The intent is to create a uniform structure and to correct an alleged disadvantage to Respondent No. 4 Board's students but the ultimate result places the students like the Petitioners appearing through the 5th Respondent Board at a disadvantage. He submits that the students are presented with a fait accompli when without consultation such amendments are proposed and carried out. The manner in which the 1st Respondent has proceeded is casual and hasty to say the least. For all these reasons, according to Mr. Dada, the impugned Government Resolutions violate the mandate of Article 14 of the Constitution of India even if it is assumed that the State has power to issue them.

37. Mr. Dada in support of his submissions, relied upon the following decisions:

1) Maharashtra State Secondary and Higher Secondary Education Board v. Paritosh Bhupesh Kumarsheth and Ors.  : AIR 1984 SC 1543.

2) Rajendra Prasad Mathur v. Karnataka University  : 1986 (Supp.) SCC 740.

3) State of Rajasthan and Ors. v. Lata Arun  : 2002 (6) SCC 252.

4) Tariq Islam v. Aligarh Muslim University and Ors.  : AIR 2001 SC 3058.

5) Indian Express Newspaper Bombay v. Union of India,  : 1985 (1) SCC 641.

6) State of Kerala v. Kumari T.P. Roshana and Anr.  : 1979 (1) SCC 572.

7) Union of India v. Pandurang Kashinath More  : 1961 (2) LLJ 427.

8) Dr. Pradeep Jain and Ors. v. Union of India and Ors.  : 1984 (3) SCC 654.

9) Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation 1948 (1) KB 223 : 1947 (2) All ER 680.

10) Francisco D. Luis v. State of Maharashtra  : 2008 (5) Bom. C.R. 569 (Percentile case ­DB)

11) PIL No. 94 of 2008 - Francisco D. Luis v. State of Maharashtra (J.N. Patel, J. dated 30/8/2008)

12) Viraj Maniar v. State of Maharashtra (dated 6/7/2009) (90:10 Quota)

38. Mr. Dada's submissions are supported by Mr. Subramaniam appearing for the 5th Respondent. While adopting the submissions he submits that similar benefit as in the impugned Government Resolution should be given to the students who have appeared for the qualifying test and examination of the ICSE Board or else the impugned Government Resolution be struck down as violative of Article 14 of the Constitution of India. He submits that all students are required to be placed on par and if the subject Government Resolution is nothing but a subterfuge and to get over binding judgments of this Court, then all the more this Court should strike down the same.

39. On the other hand, on behalf of the 1st Respondent, the learned Advocate­General submits that the Petition is devoid of any merit and substance and should be rejected in the light of the clear assertions in the affidavit in reply. He submits that it has been clarified that Regulation 79(1) is not amended and it is there in the same form. What has been proposed and carried out is an exercise whereby the necessary amendments to the Regulations of the 4th Respondent Board have been sanctioned. This has been done to facilitate the State Board to compute the marks and issue certificates on that basis. The exercise carried out is legislative in character. If the Regulations are a subordinate piece of legislation, an amendment thereto can be carried out without adherence to the principles of natural justice. Considering the legal position, the argument of broad based or effective and meaningful consultation with other Boards must necessarily fail. Further, the argument of Mr. Dada that there is a requirement of consultation is misplaced when there is none in the Regulations. The learned Advocate­General submits that no mala fides can be attributed to the legislature. Once it is well settled that this Court cannot examine the issue of equivalence and no decision on the point of equivalence has been taken but only a change in marking standards or grading of the SSC students on the basis of marks attained in all the subjects is made, then, there is no substance in the complaint that the State has presented the students with a fait accompli.. The learned Advocate­ General was at pains to draw our attention to some of the averments in the Writ Petition and the reply of the State at page 198 of the paper book. He submits that not much capital can be made of insertion in the "On­line process book", of the Government Resolution dated 25th February 2010. The subject Government Resolution is referred therein only to guide the students. It is not a Rule Book but a booklet giving information and guiding the students about on­line admission process. Therefore, it is erroneous to term it has a rule. The term rule or regulation has specific legal connotation. This is nothing but a booklet or a brochure for the information of the students and this Court should not read in it anything beyond it.

40. As far as the plea of discrimination and arbitrariness is concerned, the learned Advocate­General submits that the burden is on the Petitioners to displace the legal presumption that very statute is constitutional. The Petitioners have to point out that it is discriminatory and arbitrary by placing relevant material. The Petition must set out the necessary grounds and the pleadings should contain clear allegations. Further, they must be substantiated by annexing all relevant materials and definite and clear arguments. Oral submissions and vague assumptions cannot displace this presumption. All this is conspicuously absent and, therefore, the allegations are bald and do not require any answer. He submits the plea that all Boards are equally situated must be clearly raised and proved. The Petitioners cannot rely on stray observations in the earlier judgments of this Court and urge that there is discrimination amongst equals. In any event, the judgments in Percentile case and in the case of 90:10, are distinguishable on facts. There distinct controversy was involved. The observations therein must be seen in the context and backdrop of the issue specifically raised therein. In earlier cases, this Court was not called upon to consider the issue as to when the Regulations of 4th Respondent are being amended so as to compute and calculate the marks and determine the percentage by taking into account the Best of the Five subjects, that discrimination between students allegedly equally placed, automatically results. In such circumstances, the view taken and the conclusions reached in the earlier judgments have no application to the facts of the present case.

41. Clarifying this aspect further, the learned Advocate­ General submits that there is no discrimination at all. The exercise has been carried out to lessen the rigour for the SSC students. Earlier, marks were computed on different basis. Without diluting the requirement of passing in all subjects, what the Government has done for its own Board is to simplify the computation and calculation by the best of five policy. This is presumably because it was noticed that the students appearing through Respondent No. 4 Board were passing through severe stress and tension. To lessen the same and the rigour of the Regulations that the said exercise has been carried out. Nothing more should be read into it and, therefore, the plea of discrimination must fail.

42. In support of his above submission, the learned Advocate­ General relies upon the following decisions:

(1) Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur  : AIR 1980 SC 882 : (1980) 2 SCR 1111.

(2) Rameshchandra Kachardas Porwal v. State of Maharashtra  : AIR 1981 SC 1127 : (1981) 2 SCR 866.

(3) Bates v. Lord Hailsham of St. Marylebone (1972) 1 WLR 1373.

(4) I.E. Newspapers (Bombay) P. Ltd. v. Union of India AIR 1986 SC 515.

43. Ms. Chavan appearing on behalf of Respondent No. 4 Board invites our attention to the affidavit in reply of the Board and submits that the Petition must fail in the light of the stand of the Board. Once the issue of equivalence is not being examined and cannot be examined in the limited jurisdiction of this Court, then, the attempt to do so by challenging the subject Government Resolution must fail.

44. With the assistance of the learned Counsel appearing for parties, we have perused the Petition and the Annexures thereto including the impugned Government Resolutions, the affidavits on record, the statutory provisions and the decisions brought to our notice.

45. It is not necessary to enter into any wider controversy and particularly with regard to the ambit and scope of the power of Respondent No. 4 Board to amend its own Regulations. The relevant statutory provisions including the Regulations have been noticed in great details in our judgment in the case of Viraj Maniar v. The State of Maharashtra and Ors. (Writ Petition No. 1086 of 2009 decided on 6th July 2009) to which one of us (S.C. Dharmadhikari, J.) was a party. There, the status of the Board, its power to make Regulations, to amend and delete them, to seek sanction thereto have been gone into and considered in details. Therefore, it would be appropriate to proceed on the basis that the Board has enough powers to amend its own Regulations. Further, in the view that were are taking, it would not be necessary to go into the arguments of Mr. Dada that the Regulations have been amended without application of mind, hastily so also without proper and effective consultation. Equally, it would not be necessary to decide the issues raised by the learned Advocate­General as to whether there is any necessity of complying with the principles of natural justice because the exercise carried out is legislative in character. We have already held in the earlier judgments that the said Regulations are a piece of subordinate legislation. However, all throughout and even now what is emphasized before us is that assuming that the exercise to amend the said Regulations is legislative in nature, considering the impact it has on the future of a large number of students, academic and other bodies including experts have been widely consulted. It is not denied that in the earlier judgments of this Court the need for broad consultation is emphasized. It is the State and the Board itself which finds it necessary to consult and take into confidence academicians and the Board's intent while proposing the amendments is to consult as many persons as possible. It is the Board, which has in the earlier matters and even now, placed on record the attempts made to invite suggestions from the public at large by giving wide publicity to the proposed amendments. The argument of Mr. Dada is that even if the Government Resolution is issued on 25th February 2010, yet, its impact was felt only after the last Corrigendum. Until then, the students were not knowing their position. It is only after the Corrigendums and the corrections that the students realized the impact of the actions on their career. Even prior to that they have approached this Court challenging the Government Resolution dated 25th February 2010.

46. In the Percentile case (supra), to which one of us (the Hon'ble Acting Chief Justice) was a party, this Court emphasized that decisions of such nature must be taken well in advance, it is not after academic year commences, students are enrolled, appear for their preliminary examinations and while they are appearing in their Final examinations, that suddenly Regulations are proposed to be amended and policies undergo radical change. The Court has repeatedly emphasized that broad based effective and meaningful consultation cannot be carried out hastily and at the last minute. Such changes and amendments to the Rules and Regulations by academic bodies must be notified by the Government before the academic sessions commence so that the students know where they are placed. This Court has taken note of the pleas of parents and students that considering the large number of students appearing and passing the Qualifying Examinations and on account of lack of quality education that there is tough competition. Further, the future of students depends on their results in Xth standard exam as they prepare themselves for the Junior College admissions. It is not when they appear for examinations and after giving their papers and awaiting the results, that the State and the statutory authorities take decisions with far reaching consequences. What we find is that these observations have been followed in their breach in the present case as well. The authorities were aware of the fact that they need to hold consultations and take the parents and students into confidence. If they are aware of such consultation, they ought to have commenced the exercise in right earnest and well in advance. It is not a happy scenario that when a Resolution is issued on 25th February 2010, it is only in April 2010 that the obvious errors therein are noticed. After the error is noticed, then it takes another month to start the process of rectification. In the process of rectifying one error another error is committed. This results in issuing Corrigendum after Corrigendum. The 4th Respondent Board and the State were aware that results of other Boards are declared before the SSC results. Students therefore are waiting for the On­line admission process to be notified after the 4th Respondent Board declares its own results. If the Corrigendums are being issued at such a stage and the students as well as their parents do not know as to what policies are being evolved and how they affect them, then, to say the least, it must be held that the academic interest of the students has been sacrificed and given a go­bye by the authorities. They ought to be vigilant in such matters. In all three cases, we have noticed that there is no communication and co­ordination between the statutory authority and the Government. Different wings and departments of the Government are also to be blamed for these state of affairs. Decisions of the nature impugned in this Petition are taken without considering their legal consequences. As noticed in earlier judgments, the stand of the Government is that it is helpless because whenever they take such decisions invariably the affected students and parents approach the Court and the Court intervenes in the matter which delays the process of admissions. In the earlier judgments, we have held that the Court intervenes only because it is necessary to set right a legal violation and constitutional infraction.

47. Assuming that the amendments were permissible even at a belated stage and the exercise required no prior consultation or hearing, yet, the issue requiring consideration is what is the Best of Five policy and what it seeks to achieve.

48. In this behalf the Government Resolution dated 25th February 2010 needs to be perused carefully. A bare reading of this Government Resolution indicates that the State is aware that 10th standard examinations in Maharashtra are conducted by 4th Respondent Board, CBSE and ICSE so also others. The State is informed that save and except the 4th Respondent Board other Boards follow the practice of taking into account marks in five subjects out of six and this is how they arrange the marks of their students and their order of merit. That is how the results are declared. However, Respondent No. 4 Board conducts the 10th standard examination which is the qualifying examination and decides the percentage or basis of passing by taking into account the marks in six subjects. The percentage is decided accordingly. The introductory part of this Government Resolution recites all this and then states that for the 10th standard examination conducted by the 4th Respondent Board, a proposal was forwarded that in order to achieve uniformity, policy of best of five should be evolved and implemented. It is stated that the 1st Respondent suggested to the 4th Respondent that proposals, views and suggestions from parents, teachers, teachers' associations, educationalists and social organizations should be invited before the Final Draft is forwarded by the Board to the State. On receipt of such final proposals that the State decided that with effect from March 2010 and thereafter in all exams conducted by the 4th Respondent Board, for 10th standard, the best of five policy will be implemented and applied. The terms of the policy are set out in the Government Resolution and it is applicable to those students who have appeared for the 10th standard examination of Respondent No. 4 Board by appearing in all subjects at one time and even to those who are repeaters. The next condition is that the student must pass in all subjects, whether compulsory or otherwise. The marks in all subjects would be shown/reflected in the mark sheet. However, while notifying the Percentage of marks out of six compulsory subjects, the marks attained in five subjects would be taken into account and the percentage would be indicated on this basis. The other terms and conditions which were applicable, namely, minimum marks in Science faculty and other concessions, etc. would continue to apply. This policy was to be made applicable with effect from March 2010.

49. The principle challenge is that while giving admission to the XIth standard/Junior College course for the ensuing and further academic years in the institutions affiliated to Respondent No. 4 Board in the State of Maharashtra, the benefit of this best of five is restricted to the students who appear for qualifying 10th standard examination from the institutions affiliated to Respondent No. 4 Board only. By not making the policy applicable to the students appearing for the same examination from other Boards is there any discrimination and whether the students have been treated unequally ? In other words, in admissions to the XIth standard (First year of Junior College) whether students of ICSE (Respondent No. 5) Board are treated unequally by denial of the benefit of the Government Resolution dated 25th February 2010 is the moot question. Such treatment means treating equals unequally and this violates the mandate of Article 14 of the Constitution of India is the submission of the Petitioners' Counsel.

50. It is well settled that Article 14 of the Constitution of India mandates equality before law and equal protection of laws. Equals cannot be treated unequally. Similarly, unequals cannot be treated equally. That is how the mandate must be applied and the question is whether the State in issuing the subject Government Resolution has discriminated by treating equals unequally. What we find from the record is that throughout an attempt is made to show that students appearing for the qualifying examination from the 4th Respondent Board suffer and are at an disadvantage. It is urged that to remove the inequality and to bring them on par with students of other Boards so as to give uniform treatment to all, that the subject policy is evolved. This stand is identical to the earlier two matters. In the Percentile case (supra) as well, the basis on which the State proceeded was that the students of its own Board are at great disadvantage in comparison to the students of ICSE and CBSE Boards. They are unable to compete on account of a liberal marking policy adopted by the other Boards. There is a distinct advantage to the students of other Boards and that is how the Percentile system was evolved. That came to be challenged before a Division Bench of this Court which was divided in its opinion. The Hon'ble the then Chief Justice Swatanter Kumar presiding over the Bench did not agree with the view taken by Hon'ble Mr. Justice A.P. Deshpande (as he then was) and set out his disagreement in the following terms:

8. Besides the Petitioner, an affidavit has been filed on behalf of the Council for the Indian School Certificate Examination, wherein it has been stated that their marking is not in any way liberal or unfair. It is stated that for 10th standard there are four compulsory subjects in Group I, two optional subjects to be selected from Group II and there is one optional subject to be selected from Group III. The mark­sheet issued by this Board give marks in all the seven subjects and merit of the candidate for the purposes of higher education as well as admission to other Institution is determined on the basis of marks obtained in all the seven subjects, except for a limited purpose in their own Institutions, four major subjects are counted without affecting the merit of the student. It is stated as under:

I say that the ICSE Board updates and upgrades its syllabus from time to time to ensure that the high quality of education is given to the students.Hereto annexed and marked Exhibit "A" is comparative chart of subject marks of ICSE Board and SSC Board examinations. A mere perusal of said chart shows that the argument sought to be advanced by State is based on no reasoning at all or is based on biased reasoning with a view to benefit the SSC Board students without offering any opportunity or in fact making any logical comparison acceptable on reasonable lines. It is respectfully submitted that comparison acceptable can be made only if what is being compared can be equitably, appropriately and justifiably compared with each other. Unequals can not be compared at all and no decision for percentile system can be arrived at all on the basis of inequiality of syllabus in ICSE and SSC Board....

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13. As is clear from the affidavits filed on behalf of the State, they have proceeded on the assumption that the academic standard, syllabus, marking and courses of all the three Boards are different. An additional argument which was advanced with some vehemence on the basis of the affidavit filed by the State that there is liberal marking in the two other Boards CBSE and ICSE which is the basis for introduction of concept of normalization of marks. It was also argued that the students of these two Boards are privileged students and, therefore there is need for applying percentile formula. If this basis for the sake of argument is taken to be correct, then the State cannot adopt a policy of applying percentile formula uniformly to the students of three Boards.

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20. This itself shows that the action of the Government in issuing and implementing this Government Resolution dated 27th/30th June 2008 is arbitrary and in fact defeats the very golden rule of meritcumpreference. In the present times, where the competition to academic courses is so high that even a fraction of one mark can make difference in order of merit by 50s if not by 100. It will be totally unfair to apply a method for altering the position of merit between different classes and even between the same class. The entire emphasis is on attaining higher merit and with the principal object of getting admission to a preferential Institution, School or College. If despite attaining such merit, the students have to be subjected to such competition for determining a rank which shall prejudicially affect the very basic concept of merit, such method would be to, say the least, unjust, unfair and even unconstitutional.

21. The Supreme Court in the case of Saurabh Chaudhary v. Union of India : (2003) 11 SCC 146, has clearly given the status of basic right of a meritorious student to get admission to a better Institution as a fundamental right and held as under:

28. Right of a meritorious student to get admission in a postgraduate course is a fundamental and human right, which is required to be protected. Such a valuable right cannot be permitted to be whittled down at the instance of less meritorious students.

22. Considering a stand taken by the State in the other affidavits that the students from SSC Board were to be given some special treatment for ensuring their admission to preferential Colleges, even in that event the method adopted is totally unjust and unfair. It is apparent from the record and the argument advanced before the Court that entire process, though stated to be in consultation with the authorities, was in fact without consultation and in fact is a farce to cover the arbitrary action of the State. In the decision taken on 12th June 2008, it was decided to get opinion and data from all the Boards. This was never done. In fact, one or two odd teachers who belonged to other Boards participated and a decision is alleged to have been taken unanimously. No notice requiring the Boards to submit some information or data was served upon any of the Boards. The competent authorities in furtherance to the decision dated 12th June 2008 after holding the meeting of 26th June 2008 and preparation of the Government Resolution dated 27th June 2008 vide letter dated 30th June 2008, called upon the Boards to send their result sheets or marks of their meritorious candidates. As already noticed, the need and entire basis for taking out this exercise and arriving at the conclusion of applying percentile method is based upon preferential treatment to privileged students, liberal marking of Boards and intent to bring parity. Firstly, in fact there is nothing on record even before us to substantiate this allegation. Secondly, the concerned Boards vehemently denied any of these allegations. On the contrary, they stated that their syllabus is very comprehensive and these Boards take great pains in uplifting the academic standards and methods of teaching in the Schools under them and the students actually do well to achieve higher percentage. Even from the statistics placed on record, it is clear that even the meritorious students from SSC Board got very high percentage which easily is comparable and even is better in some cases from the students of CBSE and ICSE Boards. Thus, this entire exercise taken out by the Respondent State is without any data, cogent reasoning and even proper hearing, much less after appropriately consulting other two Boards whose meritorious candidates are bound to be affected prejudicially as a result of application of this arbitrary formula. This was a decision of great significance and far reaching consequence. It was expected of the State to take a vital decision with wide consultation on some basic data and with realisation of its consequences and after ensuring that such a policy decision was taken within the framework of law. It is a typical example where not only the decision making process is defective and erroneous, but even the decision suffers from the vice of arbitrariness, unreasonableness and is without proper application of mind.

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27. Thus, the onus to show to the Court that the decision taken by the State wherein an existing practice is changed by some kind of a thought process is on the State by placing on record its database to show atleast that its decision is free of arbitrariness. It can hardly be justified that the State has decided to give preference or adopt some method to give advantage to the students who have passed their examination from different Boards in the State of Maharashtra itself. This will suffer patently from the vice of arbitrariness and discrimination. The adverse effects of this decision can be seen from an example that two students who are studying and residing in the same area but studying in two different Schools controlled by two different Boards within the city of Mumbai and obtain the same percentage of marks, one would be reduced in rank, while the other would be upgraded just by application of this invented formula by the State without any reasoning and without any justification. This, ex facie, is abuse of executive powers. The methodology adopted by the State thus suffers from the vice of arbitrariness and cannot sustain the essential test of rule of law.

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29. In the present case as well, except a bald allegation by the State that they are different Boards, no material has been placed on record to establish markable distinction between courses, marking, syllabus and process of teaching even. Students from all the Boards study more or less the common subjects and languages, compulsory subjects are the same, the syllabus is more or less identical. In any case, this is not the ground of challenge raised by the Petitioner. Thus, I do not see any reason to discuss in greater detail, but the presumption raised by the Respondents that there was differentiation in marking system certainly is based on no material whatsoever.

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31. The judgments of the Supreme Court and the Full Bench afore­referred, clearly indicate that State should act well in time and not intermingle with the process of taking hurried decisions at the nick of the time. The results of the two Boards had already been declared and the result of the SSC Board was declared on 26th June 2008. The courses were about to start, when the Government has set into motion the proposal for issuing the Government Resolution dated 27th June 2008 vide letter dated 30th June 2008. It is not only without basis but is even in undue haste. If what is indicated in the affidavits is correct, though as already noticed, the stand is even in contradiction to its own affidavits, this aspect was known to the Government from the experience of the academic year 20072008 and it had a whole year for taking such policy decision which could remedy the alleged wrong, but such decision ought to be in accordance with law. I fully agree with the view of Deshpande, J. that the State should take such crucial decisions ahead of time and even this aspect the State has miserably failed to show as to what was the justification for taking this decision on eleventh hour without any proper study, data and without appropriate consultation with other Boards which were operating at the national level.

51. The afore­quoted paragraphs from the judgment of the Hon'ble the then Chief Justice and the conclusions therein will have some bearing on the instant case as identical contentions are raised before us. While dealing with self­same pleas and emphasizing the Rule of merit and no compromise therewith that he made the above observations. He outlined his disagreement and that is how the matter came to be referred to a third Hon'ble Judge of this Court.

52. The matter was placed before the Hon'ble Justice J.N. Patel (as the Hon'ble Acting Chief Justice then was) and after noting the rival contentions, this is what is held by His Lordship:

81. In my opinion, the contentions of the learned Counsel appearing in support of the petition are right in claiming that in respect of the two Boards ICSE and CBSE the least expected from the State before taking a decision to issue the impugned circular as a matter of policy ought to have heard the two Boards as from last several years it has been a consistent practice to admit students to 11th standard conducted by HSC Board in various streams on the basis of their percentage of marks obtained as the impugned circular has resulted in distabilising the criteria for admission which has adversely affected the interest of the students passing from 10th standard from these two Boards which is amply demonstrated in the judgment delivered by Hon'ble the Chief Justice particularly in paragraph 18 as a consequence of which the students of higher merit passing from the Board other than the SSC Board are unable to get admission to the senior schools/junior colleges of their choice. When the case of the petitioner was considered it was found that the students who are below the petitioner's percentage marks by 2.6 1%, all have been placed above the Petitioner who is at Serial No. 181 in ICSE and even the students who have secured the same percentage of marks have been placed at rank No. 69 above the Petitioner. This fallacy of applying the percentile system is also demonstrated by Mrs. Iyer which is referred in her submissions by way of illustration while assailing the introduction of percentile system. Therefore, it cannot be said that the impugned circular being a policy decision taken by the Authority need not hear the persons who are likely to be affected as contended by the learned Government Pleader by placing reliance on Bannari Amman Sugars Ltd.

82. The second contention which requires consideration is as to whether the policy decision taken by the State Government/Authority has to pass the test of Articles 14and 16 of the Constitution of India and if the policy decision has the effect of deviating from the normal and salutary rule of selection based on merit is subversive of the doctrine of equality, it cannot sustain. It should be free from the vice of arbitrariness and conform to the well settled norms both positive and negative underlying Articles 14 and16, which together with Article 15 form part of the constitutional Code of equality as held in the case of Kailash Chand Sharma. In order to ascertain whether the State has acted fairly, one will have to refer to the 'circular' itself. As rightly pointed out by the learned Counsel appearing for the intervenor in support of the petitioner that the impugned circular proceeds on the basis that if the practice of giving admission as per the past practice is continued students who pass examination from Maharashtra Secondary and Higher Secondary Education Board and the students who have passed the examination with more marks of other examination Boards obviously they get preference in reputed junior colleges on the basis of their marks. Therefore, Secondary School Certificate and comparing to other Boards students who have achieved less marks they did not get preference in such Junior colleges. This inference is drawn by the Government on the basis of "like this sentiment is seen in the society". It is because of this perception that the State decided to introduce the percentile ranking method for the purpose of bringing about equalization in the marks of students who have passed 10th standard examination from various Boards. This has been accepted as not only justifiable but reasonable by His Lordship Deshpande, J. which is indicated in his observation that the State has come up with the impugned circular on the basis of the perception prevailing in the society and that the students passing from SSC Board are put in a disadvantageous position by referring to the affidavit in reply dated 15th July, 2008 filed by the Deputy Secretary to the Government, School Education and Sports Department. In the two affidavits in reply filed by the Deputy Secretary in response to the Public Interest Litigation what the State has tried to justify is that their decision is not arbitrary and is within the para­meters of the Wednesbury's reasonableness though in the circular except for expressing that the percentile ranking is introduced to bring about normalization / equalization and particularly with a view to place the students passing their examination from Secondary School Certificate Examination on the basis of certain sentiments prevailing in the society. The affidavits in reply filed by the Deputy Secretary does not specify as the source from which the State arrived at certain conclusions and, therefore, in order to justify passing of the impugned circular the State has tried to claim that as there is a vast difference in the syllabus, marking patten, compulsory and optional subjects, etc., for the students passing through the respective Boards and that the pattern of education and marking of all the Boards being different which has been demonstrated by the total marks allotted for SSC Board examination and other Boards. Further, from the subjects, compulsory and optional and particularly for SSC mathematic is a compulsory subject while for ICSE it is not compulsory and the fact that the other Boards give 15 minutes for the students to read the question paper and the pattern of setting the question paper in the examination being different such as the proportion of students from S.S.C. Board getting admission in 11th standard is much less than the proportion of students in the other Boards. This deserved to be corrected by adopting the procedure of normalization through the method of percentile system.

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85. In the case of AIIMS Students' Union v. AIIMS and Ors.  : (2002) 1 SCC 428 the Hon'ble the Supreme Court has held as under:­ "The facts found by the Delhi High Court, well articulated by the learned Chief Justice speaking for the Division Bench of the High Court of Delhi, visibly demonstrate the arbitrariness and hence unsustainability of such a reservation. It was an outcome of agitation­generated pressure depriving application of mind, reason and objectivity of those who took the decision. No material has been placed on record to show that the Institute graduates, if asked to face all­India competition while seeking PG seats, would get none or face feeble opportunities because of the policies of other universities. The way merit has been made a martyr by the institutional reservation policy of AIIMS, the high hopes on which rests the foundation of AIIMS are belied. No sound and sensible mind can accept scores of 15­20% being declared as passed, crossing over the queue and arraigning themselves above scorers of 60­70% and that too to sit in a course where they will be declared qualified to fight with dreaded and complicated threats to human life. Will a less efficient postgraduate or specialist doctor be a boon to society? Is human life so cheap as to be entrusted to mediocres when meritorious are available? If the answer is yes, we are cutting at the roots of the nation's health and depriving right to equality of its meaning. We have no hesitation in holding, and thereby agreeing with the Division Bench of the High Court that reserving 33% seats for institutional candidates was in effect 100% reservation for subjects. Coupled with 50% reservation in allocation of specialties not exceeding overall 33% reservation integrated with 65 percentile - a complex method, the actual working whereof even the learned Senior Counsel for the parties frankly confessed their inability in demonstrating before us at the time of hearing - is a conceited gimmick and accentuated politics of pampering students, weak in merit but mighty in strength. Such a reservation based on institutional continuity in the absence of any relevant evidence in justification thereof is unconstitutional and violative of Article 14of the Constitution and has therefore to be struck down. The impugned reservation, obnoxious to merit, fails to satisfy the twin test under Article 14. Having taken a common entrance test, there is no intelligible differentia which distinguishes the institutional candidates from others; and there is no nexus sought to be achieved with the objects of AIIMS by such reservation. Can the court sustain and uphold such reservation? "Justice is the earnest and constant will to render every man his due. The precepts of the law are these: to live honourably, to injure no other man, to render to every man his due" ­­ said Justinian. Giving a man his due, one of the basics of justice, finds reflected in right to equality. Mediocracy over meritocracy cuts at the roots of justice and hurts right to equality. Protective push or prop, by way of reservation or classification must withstand the test of Article 14. Any overgenerous approach to a section of the beneficiaries, if it has the effect of destroying another's right to education, more so, by pushing a mediocre over a meritorious, belies the hope of our founding fathers on which they structured the great document of the Constitution and so must fall to the ground. To deprive a man of merit of his due, even marginally, no rule shall sustain except by the aid of the Constitution; one such situation being when deprivation itself achieves equality subject to satisfying the tests of reason,, reasonability and rational nexus with the object underlying deprivation."

86. The contention of the learned Additional Govt. Pleader based on the decision of the Supreme Court in the case of Bannari Amman Sugars Ltd., 4 that the Court should normally not interfere with the policy decision taken by the State and particularly when the same is going to benefit lakhs of students appearing from the said Board, does not find favour with the Court. I do not propose to enter into the arena as regards the powers of judicial review vested with the Court in order to ascertain the validity of the statute / circular issued by the State as it is well settled and already reflected in the judgment of the Hon'ble the Chief Justice and I have no hesitation to hold that the basis on which the State issued the said circular is hypothetical and without any foundation and that too being taken in a hurried manner. The least expected of the State was to have conducted survey and collected data as regards the alleged injustice being suffered by SSC students and after scientific analysis of the so called public sentiments that the students of SSC Board are placed in an disadvantageous position and after due deliberation and with the expected responsibility taken a decision. But what one finds is that the State was moved particularly on public perception and considering the ratio of students appearing in various boards for their 10th standard examination. No doubt, that all the boards were conducting 10th standard examination have different syllabus, pattern of setting examination papers, valuation and so on which is very obvious if one goes through the syllabus but that by itself cannot lead to the conclusion that the students appearing for 10th standard examination from SSC Board are placed in an disadvantageous position and so in order to mitigate the deficiency come up with an ad­hoc solution which has resulted in depriving a section of the students who have passed the 10th standard examination from other Boards i.e. I.C.S.E. and C.B.S.E., of their opportunity to seek admission in the college and subject of their choice. The State ought to have acted with responsibility particularly when it is dealing with students who are prosecuting their studies in schools. Most of the decisions on reservation and classification of students relates to professional courses like medical and engineering and may not apply as valid precedents to students in schools.

53. In other words, he expressed his agreement with the views of the then Hon'ble Chief Justice and disagreed with the view of Hon'ble Mr. Justice A.P. Deshpande. The majority thus held that the rule of percentile was violative of the mandate of Article 14 of the Constitution of India. It discriminated amongst students who are equally placed. The Courts went into all details and observed that the State and the Board failed to place before it relevant data which would enable it to come to the conclusion that the students of the State Board are at an disadvantage. The 1st Respondent State raised the very plea of unfair advantage to other Boards' students and disadvantage to SSC students but it was not in a position to substantiate the said plea is the ultimate conclusion.

54. As if the Percentile case (supra) was not enough, the State made another attempt and on the next occasion in the academic year 2009­10, it evolved a policy of reserving 90% of seats for the XIth standard course in the colleges affiliated to the 4th Respondent Board, for only the students of SSC Board. The balance 10% were to go to the students of other Boards. Terming this as a classification and not a reservation, the challenge to this Government Resolution by other set of students who appeared for `Xth Standard' qualifying examination, was sought to be repelled. The matter was placed before a Division Bench consisting of the then Hon'ble Chief Justice and myself (S.C. Dharmadhikari, J.). The argument was that there is no attempt to get over a binding Judgment in Percentile case (supra). The facts are distinct from the earlier decision and, therefore, this Court must decide the matter independently. While noting the challenge and the pleas raised, in answer thereto, the Division Bench held as under:

50. The argument on behalf of the Petitioners is that the State has treated all students appearing and clearing the X standard examination, irrespective of the Education Boards from which they appear for such examinations, as equals. On the other hand, the State Government argues that they are coming from two different sources inasmuch as students of SSC Board have always been treated distinctly than that of the other Boards. These are two distinct sources from which the students become eligible for admission to XI standard course.

51. To appreciate this argument a reference will have to be made to the fact as to whether the State has at all treated these students distinctly. All the Petitioners have raised a specific plea and contention that from 1993 till 2009, i.e. for a period of 16 years atleast, the students have been treated equally. The State was aware of the existence of other Boards and that these Boards are conducting examinations for educational institutions affiliated to them within the State of Maharashtra. Rather, it has recognised and accepted this fact. It is pertinent to note that there is no denial of this factual assertion. Once it is asserted as a matter of fact and in each of the Writ Petitions, the Petitioners have raised this plea, then, we cannot hold that the pleadings are inadequate or insufficient as contended by Mr. Singhvi. The Petitioners have in addition to urging as above, invited the attention of the Court to the judgment delivered in Percentile case. They have specifically argued that the plea raised to the above effect has been considered in the Percentile judgment and specifically turned down. Thus, that all Boards were functional in the State, that all Boards were conducting standard X examination in the State, that all Boards were enrolling students in the Educational Institutions affiliated to them within the State of Maharashtra, that such examinations were conducted by all Boards in the State of Maharashtra, is undisputed. The State has not denied this fact so also the SSC Board. In such circumstances, how could the State charge the Petitioners of not furnishing enough particulars or not discharging the burden cast on them in law is not clear to us at all. Hence, before proceeding further, we clear the ground and overrule the objection of Mr. Singhvi that the pleadings in this case are inadequate to decide the issue raised with regard to the Government Resolution being unconstitutional and violative of the mandate of Articles 14 and 21 of the Constitution of India. We are of the view that the initial burden has been discharged by the Petitioners. Ultimately, there is a specific plea of arbitrariness, inequality, discrimination, unreasonableness and unfairness of the Government action raised in each of these Writ Petitions. There is a reference to the Percentile case and basic facts are also set out. Hence, with this material, Petitioners have discharged their initial burden and it was for the State to support the impugned action/Government Resolution.

52. We, therefore, overrule the preliminary objections. Then, we will have to consider as to whether the students of all Boards have been treated equally in the State of Maharashtra or not. In this behalf, a reference can be made to the Regulations of the State Board. Regulation 79 has been reproduced by us. The said Regulation read as a whole makes it clear that the SSC Board is aware of the existence of other Education Boards in India. Further, it is aware that such Boards are conducting X year secondary school certificate examination. It is aware of the fact that X standard school examination is the qualifying examination. It is aware that both CBSE and ICSE Boards are functioning within the State of Maharashtra. In such circumstances, it has therefore provided in Regulation 79 that students who have passed Secondary School Certificate examination from other Board shall also be eligible for admission to first year junior college. Similarly, it is aware of the existence of CBSE course as well. It therefore provided that all such students are eligible for being enrolled in a junior college provided the subjects offered by them are those which are prescribed by the Regulations. That is how Regulation 79(16) reads. The words "equivalent examination" appearing therein must be seen in the backdrop of the sub­Regulations in Regulation 79 and the existence of the other Boards conducting the examinations for Xth standard. In such circumstances and when both the CBSE and ICSE Boards being in existence atleast from 1959 and 1963 so also their students being treated equally atleast from 1993 by the State of Maharashtra is something which would falsify the case of the State now put forward that there are different sources from which these students appear for Xth standard examination. The State has treated them as equally eligible. The State and the SSC Board has not made any distinction between them and the Education Boards to which their educational institutions within the State, are affiliated. Further, all these students had appeared for the examinations in the State of Maharashtra. In this view of the matter, we are of the view that the arguments that there are two different sources of admissions to Junior Colleges is untenable and cannot be accepted.

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63. Strong reliance has been placed on the decision in Percentile case by the learned Counsel appearing for the Petitioners before us and in our opinion their argument that the controversy before us stands concluded by this judgment, is well founded. The majority opinion in the Percentile case relied upon the settled principles laid down in the Supreme Court decisions to which detailed reference has been made. Somewhat identical contentions were raised before the Supreme Court in the case of Saurabh Chaudhri (supra) and the settled rule that merit­cum­preference is the only criteria was restated in this judgment. If merit has to be sacrificed for local preference, there has to be some justification and that justification must stand the scrutiny of the test of fairness and reasonableness in State action. If the decisions are impugned as arbitrary and unconstitutional, then, material has to be placed before the Court by which the Court can conclude that the decision is not a class legislation but reasonable classification having nexus with the object sought to be achieved. For the classification to be termed as reasonable, there must be some basis on which the action is taken. There must appear to be not just a distinction but intelligible differentia by which those who have been left out from the group can be distinguished. If there is no such differentia in existence and placed on record, then all such decisions, whether they be policy decisions, are vulnerable.

64. However, the argument of the learned Counsel appearing for the State before us is that in Percentile case there was no question involved of any carving of seats for the students of SSC Board whereas here there is a classification which has been done on the basis of which the seats are carved out for them. According to him, in Percentile case the formula was only with regard to the marks, but in the instant case, seats are being reserved and earmarked for SSC Board students. Therefore the principle laid down in Percentile case has no bearing or relevancy in so far as the subject Government Resolution is concerned.

65. We are afraid that we cannot uphold this contention. First of all, the Percentile decision has been rendered after this Court was called upon to decide as to whether the classification between the students of SSC Board and other Boards is reasonable and whether there is any real basis for the same. If the classification was artificial and without any basis, then no formula could be evolved for granting any benefit to the SSC Board students. It is in that context that this Court was called upon to decide as to whether it can be said that SSC Board students and non­SSC Board students, both of whom, are appearing for the Xth standard qualifying examination, can be said to be situated identically or there is any difference. After scanning the entire material placed before the Court, two learned Judges, which consists the majority view of this Court, held that there is really no distinction between the students. The distinction as made was completely irrational and without any reasonable basis.

66. We wonder as to how after this authoritative pronouncement and when the State Government has accepted the verdict of this Court that it could have taken the decision to issue the subject Government Resolution. The Government Resolution proceeds on the basis that in Percentile case the very same issue indeed was before this Court. However, overlooking the majority view and taking the observations of Hon'ble Mr Justice A.P. Deshpande alone, in the preamble to the subject Government Resolution, an attempt is made to urge that "percentile was a distinct controversy". If the controversy in that Petition and the present one was indeed distinct and not identical, then, we fail to understand as to how repeatedly a reference has been made by the State itself to the decision of this Court in Percentile case. Aware as the State is that the controversy was identical, it proceeded to brush aside and ignore the judgment in Percentile case and therefore there is justification in the Petitioners' complaint that the State Government did not learn any lesson from this verdict. Having accepted it, it was the plain duty of the State to abide by it and not to brush it aside. The impugned Government Resolution is therefore clearly contrary to the binding judgment of this Court in Percentile case. It is immaterial what the non SSC Board students argued in that case. Their shifting stand does not mean the Judgment of this Court striking down the formula and the classification is not binding on the State.

67. Assuming that the controversy in Percentile case and the present case is not identical, let us see as to how the State Government substantiates its decision to issue the subject Government Resolution on affidavit. In the instant case on affidavit the State Government has stated thus:

2. I say the compelling reasons that necessitated the issuance of the impugned GR dated 18th June, 2009 are stated by me hereinunder. I say that a mere perusal of the syllabi followed by the State Boards conducting SSC examination and the Board exams conducted by the ICSE ipso facto reveal the differences therein. For the sake of brevity the said Boards shall be hereinafter be referred as ICSE. The comparative information regarding the scheme of examination is more particularly reflected in the chart, a copy whereof is hereto annexed and marked as EXHIBIT `I'. It is pertinent to note that students appearing for SSC examinations have to answer 3 languages and it is compulsory for the students to appear for the Marathi, Hindi and English papers. As far as the ICSE students are concerned, they have to appear for any 2 languages, out of which English is a compulsory subject. For ICSE, the overall weightage which languages have in the final results of students is as under:



A mere perusal of the of the aforesaid position reveals the fact that for an SSC student, out of 600 marks, 300 marks, that is 46% are allotted to languages, whereas for an ICSE student out of 700 marks, 200 marks, that is 28% of the total marks are allotted to languages. The said position is also clear from the Regulations adopted by the ICSE Board in respect of the combination of subjects that are available to its students. I crave leave to refer to and rely upon the relevant Regulations pertaining to the subjects offered by the ICSE students as and when produced. Moreover, the SSC student has to clear all the seven subjects, whereas the students of ICSE has to clear only 5 out of 6 subjects. Further, in the case of ICSE student best of the 5 subjects are considered for calculating the percentage of marks. Whereas, in the case of SSC students marks of all the subjects are considered for percentage of marks.

3. I say that 16,03,144 students appeared for the SSC examinations in 2008­2009 in Maharashtra, whereas, only 15,608 students appeared for the Xth Grade Examination in the said year. From the aforesaid, it is clear that the number of students passing out through the SSC Boards is far too higher when compared to the number of students who appear through the other Boards. I say that majority of seats in premier educational institutions are cornered by students from other Boards and not from the SSC Boards, though as a matter of right and since the colleges conducting XI and XII standards are primarily meant for the SSC Boards, they should have had the said benefit. This fact is revealed from the chart, a copy whereof is hereto annexed and marked as EXHIBIT `2'. By reason of liberal marking, the ICSE students tend to score a higher percentage of marks and consequently the ICSE students grab seats in preferred colleges, whereas, equally meritorious students get lesser seats in the preferred colleges. In order to remove this injustice quota has been fixed so that meritorious students are also enabled to get seats in preferred colleges.

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5. I say that according to the State Government, allotment of such quota will allow both the groups to secure reasonable of seats in preferred colleges. According to the State Government all the students whether from the SSC Board or other Board will get admission in one of the other college. In the submission of the State, what is guaranteed to a student is his admission to a college but not in a particular college. According to the State Government this is a policy decision which will do justice to the students coming from both the streams. According to the State Government, a student passing from the SSC Board and those passing from other Board are 2 different groups and are unequals. To give equal opportunity to seek admission to 2 unequals will result in gross discrimination. By reason of the above, the students from ICSE and SSC Boards are 2 different streams merging in one ocean. They are unequals, and giving same opportunity to unequals will obviously lead to discrimination. In order to avoid this discrimination, quota has been fixed by the State Government so that both, the groups are enabled to get seats in preferred colleges. Since the number of students who appeared in SSC examination in Maharashtra is 16,03,144 and number of students in other Boards is 15,608 and taking into consideration all the aforesaid facts and also interest of stake holders, the Government thought it fit to allot 90% of the seats in colleges to SSC students and 10% to students from other Boards.

68. If the Government Resolution is carefully perused then one thing is apparent and that is that what led the State Government to take the instant decision is the so called rush to seek admissions in preferred colleges in the Metropolitan cities. In the view of the State Government, there were very few preferred colleges in such cities and there was a clamour for seeking admission therein. Such preferred colleges had distinct academic standards of their own, their extra curricular activities, their faculty and the general teaching and academic environment therein attracts large number of students to such colleges and particularly to the Junior College course conducted therein. Now, there is no definition of the term "preferred college". There is no basis of the concept "Metropolitan cities". If in the opinion of the State Government Pune and Mumbai are the Metropolitan cities having such preferred colleges, then, it was incumbent upon it to have placed material including number of seats, the admissions therein of the SSC Board and non SSC Board students, the comparison which would show that SSC students are at disadvantage, etc. Barring the statements in the affidavit there is no such material placed save and except annexing therewith a comparative chart i.e. on the scheme of admissions. However, at page 96 year­wise and merit­wise details of first 100 students admitted in four Junior Colleges in the city in various academic years have been set out. It is stated that few SSC students have been admitted whereas other Board students admitted are far more in number. As far as this chart is concerned, that is annexed to justify the statement on affidavit that majority of seats in premier educational institutions are cornered by students of other Boards and not from SSC Boards, though as a matter of right and since the colleges conducting XIth and XIIth standards are primarily meant for SSC Board students, they should have had the said benefit. It is then stated that by reason of liberal marking ICSE students tend to score higher percentage of marks and consequently these students grab seats in preferred colleges. In order to remove this injustice, quota has been fixed so that meritorious students also get seats in preferred colleges.

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70. We have carefully perused these charts and what we find is that in preferred colleges which are set out in Annexure AV page 43, the ISCE and CBSE Board students have not cornered or grabbed seats in any of the academic years under reference. Far from supporting the stand taken by the State and the SSC Board on affidavits, these figures would militate against the same. All this really means that the decision is taken bearing in mind some few colleges and premier institutions in Mumbai. That such a vital decision has been taken on the basis that the students of SSC Board are suffering and are at a disadvantage in the State of Maharashtra but ultimately reliance is placed only on the figures of admissions of some few colleges in the city of Mumbai, then, one fails to understand as to how the State Government concludes that SSC Board students are a distinct group and they have been at a disadvantage all these years. As is apparent from the conclusions recorded by this Court in Percentile case and even by us, there is nothing on record which would indicate that the State was right in concluding that SSC Board students are a distinct class than the students from other Boards. The SSC Board Regulations do not make any such distinction but treats students from all Boards as eligible for admission to Junior College provided they have passed Xth standard examination of their respective Boards with the subjects enumerated in Regulation 79(xiv) of the Regulations. Therefore, the highest academic body in the State as far as Secondary and Higher Secondary education is concerned, does not hold the view that its students and other students must be treated differently. It is the presumption of the State Government alone that SSC Board students are a distinct class. Having found that there is no reasonable basis for such a conclusion, an attempt is made to justify the impugned Government Resolution on the ground that the SSC Board students suffer disadvantage in getting admissions to preferred colleges in the city. If SSC Board students cannot be treated differently for admission to XIth standard Junior College, then, we really do not see how the State can justify the impugned Government Resolution on the basis of the alleged disadvantage to them. However, from whatever material has been produced during the course of arguments, we find that there is no disadvantage.

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73. A faint attempt is made to justify the impugned Government Resolution by urging that the State Board was of the opinion throughout that its students are at a distinct disadvantage in comparison to the students from ICSE and CBSE Boards. It was urged that 16,03,144 students appeared from the SSC Board in 200809, whereas only 15,608 students appeared for the Xth standard from another Board. Such vast number of students from one single Board alone would justify a decision to reserve seats for them in preferred colleges is the basis for this argument. The argument is without any substance and merit inasmuch as the chart produced by the State Government would indicate that despite such large number of students appearing for the SSC examination and possibly clearing them, has not resulted in their not getting seats in preferred colleges inasmuch as even in preferred colleges barring a few cases here and there, SSC Board students have got admissions. That is the experience even in this academic year. It would be interesting to see as to what the SSC Board has to say about this aspect. It has urged that there are major differences in the syllabus, the examinations conducted and marking pattern of each of these Boards and some data was placed before us as an annexure to the affidavit of the Board. However, the entire affidavit of the Board barring stating that the impugned Government Resolution prescribes a quota for admissions of the students prosecuting their duties from institutions affiliated to the State Board considering their number, nothing has been said with regard to the alleged injustice or disadvantage. We feel that the State Board was the best and possibly the only authority which could have demonstrated the disadvantage or injustice, if it was really there. The Board has stated nothing of this kind. Yet, the State Government persists with its stand that the State Board was consulted and only after such consultations and advise that the decision to issue the impugned Government Resolution was taken. The Chairman of the Board has filed an affidavit before us and in the entire affidavit there is nothing which would indicate that the State Government was advised by the Board to issue the subject Government Resolution. The affidavit is conspicuously silent about any consultation either.

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76. In these circumstances, we have no alternative but to hold that the issuance of the subject Government Resolution is nothing but an arbitrary and discriminatory action of the State. Thus impugned Government Resolution is grossly unfair, unjust, unreasonable and wholly arbitrary. It violates the mandate of Article 14 of the Constitution of India.

55. Once again, it is clear from the above that even in this case, apart from applying the ratio in Percentile case (supra), this Court independently considered the matter. In issue was the policy or power of the State in promulgating the Government Resolution reserving 90% of the seats in the First year of Junior College (XIth standard) exclusively for the students of Respondent No. 4 Board. At one stage, the distinction between "classification" and "reservation" was stressed but later on it was urged that even if the same is reservation, that is justified because of the disadvantage to the SSC Board students. The Division Bench decided the matter on both points, namely, the power of the State to issue such Government Resolution and the plea of discrimination. It also dealt with the argument that the judgment earlier rendered in Percentile case (supra) has no application to such reservation. Applying the rule that merit­cum­preference is the only criteria, all that both the Division Benches have done is to follow the binding decisions of the Supreme Court. The Supreme Court decisions on the point of Merit­cum­preference and Rule of Equality were sought to be distinguished on the ground that when they emphasized such rule it was in the context of admission to Post­Graduate professional studies. The Division Bench noted this argument and held that it is not possible to whittle down or dilute the ratio in the binding judgments of the Supreme Court and read them in such manner. What the Supreme Court has been emphasizing all throughout is that the rule of merit must prevail. There cannot be any discrimination between students appearing in the same Qualifying Examination and less meritorious ought not to steal a march by any back­door method. It is that dictum and principle which has been followed by us.

56. Reliance was placed on the principle as laid down in the recent judgment in Saurabh Choudhari v. Union of India reported in  : (2003) 11 SCC 146. What was argued before the Division Bench by the State was that in "Percentile" case (supra) there was no question involved of carving out seats for SSC students Board whereas here there is a classification on the basis of which the seats are carved out for them. It was argued that in Percentile case (supra) what was evolved was a formula with regard to marks, but in the 90:10 case the seats are being reserved and earmarked for Respondent No. 4 Board's students and that is a distinct action. The Court observed that such a distinction cannot be upheld. The decision in Percentile case (supra) was rendered because this Court was required to decide as to whether the classification between students of SSC Board and other Boards is reasonable and whether there is any real basis for such a classification. The issue raised was that this classification is artificial and without any basis. What the majority in Percentile case (supra) held was that there is no real distinction between the students. The distinction as sought to be made was only of State's imagination and wholly artificial.

57. The judgments of this Court in both matters have not been challenged by the State in higher Court so also not reversed or set aside. Yet, the State persists with its policy of classifying students for the qualifying examination in this manner. In the latter judgment, the Court noted that the Government Resolution under challenge referred only to the judgment of the minority, namely, the view of Hon'ble Mr. Justice A.P. Deshpande. It did not refer to the majority view. If the controversy in Percentile case (supra) and 90:10 (supra) was not identical and distinct, then there was no occasion for the Government Resolution in 90:10 to refer to the earlier judgment in Percentile case. The Division Bench strongly indicted the State in the matter of 90:10 by observing that the State is aware that the controversy was identical and yet it proceeded to brush aside and ignore the binding judgment in Percentile case (supra). The State did not learn any lesson from its mistake was a plea raised by the Petitioner students in 90:10 and the Court had no alternative but to uphold it. Thereafter the Court considered the plea as to whether really there was any disadvantage faced by the SSC Board students. What the Division Bench concluded was that a careful perusal of the Government Resolution would demonstrate that the decision was taken only by keeping in mind some preferred colleges in Metropolitan cities like Mumbai and Pune. If the view of the State Government is that there are preferred colleges in such cities and there was heavy rush for seeking admissions therein, because of the distinct academic standards of these colleges, then, definite criteria should have been evolved as to which institutions or colleges can be termed as "preferred colleges". Further, apart from the vague term "preferred college", another ambiguous concept of metropolitan city was set out in that Government Resolution. If the opinion of the State Government in that case was metropolitan cities means only Pune and Mumbai having such preferred colleges, then, it was necessary to place full material including number of seats, admissions given to the SSC and non­SSC Board students for a comparison which would show that SSC students are at disadvantage. The Division Bench noted that barring the bald statements in the affidavit no such material was placed. A chart was handed in to the Court which indicated the position to be wholly contrary. There were enough number of seats available even in Mumbai and Pune and in fact the State has to concede before the Court the intake capacity of the colleges in Mumbai Metropolitan region was 2,48,411 and this excluded the colleges of Konkan Region. Therefore, when the officials of the State and the Board were present in Court and it repeatedly raised queries as to what is the need for reservation of seats that it was held that the State has failed to substantiate any of the pleas of inequality or disadvantage to SSC Board. The Court was constrained to hold that the SSC Board students could not be termed as a distinct class from the other Boards. Even in the instant case, it is conceded that the Government Resolution dated 25th February 2010 is restricted in the application to the students of the Respondent No. 4 (SSC) Board. The Petitioners are excluded from the purview of the same and would not derive any benefit of Best of five policy. Thus, for admissions to the XIth standard the Percentage of marks for the students of both Boards would be computed distinctly. It is asserted that this is done because SSC Board students are suffering and at an disadvantage.

58. The decisions rendered earlier are relied upon even in the present case and Mr. Dada and Mr. Subramaniam urged that in an attempt to get over these binding judgments, the policy of best of five has been evolved. We find much substance in this contention of the learned Senior Counsel. In the present case, a perusal of the Government Resolution indicates that this time the State uses the term `bringing uniformity'. In the garb of bringing uniformity for the assignment of marks, their computation and allocation of grades, what has been done is that a policy is evolved which enables picking up of five subjects of the SSC Board examination in which the best marks have been attained. However, the marks assigned to the best five subjects would be taken only in case of the students appearing for the (Xth standard) qualifying examination through the 4th Respondent Board. From a perusal of the Government Resolution, the affidavits on record and the stand taken by the State before us, it is more than clear that the best of five policy would not apply to the Petitioners and other students appearing for the same qualifying examination through the 5th Respondent Council/Board. During the course of arguments, we repeatedly called upon the learned Counsel appearing for the Respondents to take instructions and state as to whether the State would extend this policy to the students appearing for the qualifying examination through other Boards. The learned Advocate­General on instructions stated that the policy cannot be extended to them. It is for the 5th Respondent to upgrade its own students. They can choose their five best subjects and assign the marks on that basis. In other words, they can evolve their best of five policy but no clear assurance was forth coming as to whether the State would on its own apply the Government Resolution dated 25th February 2010 to all students appearing for the Xth standard examination irrespective of the Boards to which their institutions are affiliated. Therefore, the argument of the Respondent No. 5 becomes relevant. Mr. Subramaniam handed in figures to the Court to buttress his submission that there is no disadvantage to SSC students. Instead, the Government Resolution is a windfall. The figures handed in shows that only 8298 students of Respondent No. 5 appeared for the Standard X examinations in the academic year 2009­10. The figure is not disputed by the Respondents. On the other hand, it is stated that 16,00,000 students took the Standard X examination through Respondent No. 4 Board. We enquired from the Respondent­State as to whether there are few seats in premier Institutions in the State and that is the reason why the Government Resolution is made exclusively for the SSC Board students. There is nothing to indicate that all the Junior College seats in the premier educational Institutes of the State would be cornered by non­SSC Board students and particularly by 8,298 students of Respondent No. 5 Board. No data, no figures, no record, no document is produced. Yet, the chanting that SSC Board students suffered all these years and are disadvantaged continued. The oral assertion unsupported by any material and in the teeth of binding Judgments of this Court must be necessarily rejected. In such circumstances, we are called upon to decide is to whether the policy evolved gives an unfair advantage to the students appearing through Respondent No. 4 Board and and places Respondent No. 5 Board and its students at a disadvantage.

59. That answer will be obviously in the affirmative. The State while evolving the best of five policy is discriminating between students who are similarly placed for admissions to XI standard Junior Colleges, the State has failed to satisfy the Court as to why the subject Government Resolution was restricted in its application to the students of Respondent No. 4 Board. The argument that what the State has done is to upgrade its own students hardly impresses us. Further, Regulations 56, 58 59 of the said Regulations are amended and that is why the policy evolved is restricted to SSC students is a submission which hardly impresses us. The State may be permitted in law to accept the recommendations and proposals emanating from Respondent No. 4 for amending its own Regulations. The State may be empowered to sanction these amendments so that the students of Respondent No. 4 Board can be upgraded, if at all the Board thought it fit and that there was necessity of doing so. The question is not about what the Respondent No. 4 requested the State to do. In law, the Respondent No. 4 can forward proposals for amendment to its Regulations and the State is equally empowered to accept, approve and sanction them. The State while accepting the proposals and recommendations appears to have on its own decided to restrict the best of five policy to the students of Respondent No. 4 Board by excluding from its purview the non­SSC Board students. We have already held in the judgments in Viraj Maniar (90:10) (supra) and Percentile case (supra) that even Respondent No. 4 Board could not have called upon the State to make such an exclusion yet, what prevailed upon the State Government to exclude the non­SSC Board students is not clear to us at all and remains unexplained. The argument that this is not an attempt to over­reach the Court and by­pass and brush aside the binding judgments is without substance.

60. The State was very well aware of its stand before the Division Benches of this Court in earlier decisions. The same plea of the SSC students being at an disadvantage is reiterated before us. The learned Advocate­General with his usual fairness and ability did pursue it for some time, but the fact remains that on affidavit it has been more than once made clear by the State that the best of five policy is to remove the disadvantage to the SSC Board students. The learned Advocate­General with all persuasion at his command, could not convince us that there was any disadvantage. He only emphasized that the SSC Board constitutes the majority and the State could not have ignored their Academic Interest. However, he was unable to substantiate the argument of disadvantage to SSC Board students by producing any material save and except urging that the Curricula, the exam and marking pattern of the ICSE students is less cumbersome and liberal. Marks are assigned for subjects such as Cookery, Drawing, Art and Craft which increases their percentage in comparison to the SSC Board students. Therefore, it is possible for them to easily walk in prime Colleges. This results in disadvantage to SSC Board students and they suffer in the process. We are afraid we cannot accept this submission. Firstly, there is nothing to support this plea except the statement in the Government Resolution and the affidavit of the State. How the non¬SSC Board students gained over years should have been demonstrated by producing statement of relative marks, the number of seats available in prime colleges and they being grabbed by the non­SSC Board students, though they are few in number, only on the basis of their liberal marking and high ranking. We are told to draw conclusions on the basis of the oral statements across the Bar. Then, the plea of public outcry and anger of the SSC Board students was raised. We are afraid that emotions and sympathy can have no place in such matters and they cannot be decided on that basis alone. These pleas were raised in the earlier matters and the State miserably failed to substantiate them. Self­same pleas as in "Percentile" case (supra) are reiterated before us and we have no hesitation in rejecting them. The learned Advocate­General then simplifies the entire exercise by terming it as nothing but correction of the Regulations pertaining to computation of marks, award of prizes and certificates. It is not as simple as that because the State Government Resolution read in its entirety shows that the non¬SSC Board students will not be given the benefit of the best of five policy.

61. Ultimately, in this case the question is not of the power of the 4th Respondent Board to amend its own Regulations so as to upgrade its students or better their marks. Further, the power to amend the said Regulations so as to compute and calculate the marks and percentage in a particular manner is also not a disputed question. None have placed any extreme proposition on this issue. What the argument on behalf of the Respondents over­looks is the fact that the recommendations and proposals of academic bodies like Respondent No. 4 Board forwarded to the State have to be accepted, approved and sanctioned by the State. It is while accepting, approving and sanctioning them that the State in this case took the decision that the policy of best of five should be restricted in its application to the SSC students. It is clear that the State has taken such a decision but it could not substantiate its stand of keeping out the students of Respondent No. 5 Council. Thus, the benefit of best of five will not be available to the students of IC SE. All this is done at the stage of admission to Junior College (XI standard). When the State cannot and does not dispute that in admissions to Junior College students of statutory and non­ statutory boards can apply, then, while conferring a benefit on one set of students and excluding the other, it is the State which has lost sight of the mandate of Article 14 of the Constitution of India and the guarantee of equality enshrined therein. It is the decision of the State which is challenged and for the reasons afore­noted we are compelled to quash it. In other words, there would not have been any difficulty in upholding the policy decision of best of five if there was no discrimination. The discrimination being clear and on the face of it, we have no alternative but to strike down the decision of the State. Thus, we have proceeded on the basis that the 4th Respondent Board's powers in law may permit it to make the proposals for upgrading its own students and further act in such a manner so as to ease their tension and stress, but while accepting the proposals and recommendations the State could not have acted contrary to the Constitutional mandate. Precisely, this is what is done in this case. Further, the Rule of merit is also brushed aside by the State. A meritorious student must be allowed to pursue higher studies in an Institution which he chooses on the basis of his marks, Percentage and Ranking. Everybody can compete for the best College/Institution, irrespective of the Education Board to which he belongs, on the basis of his or her Merit. No attempt to lower the merit should be tolerated in academic matters and that is the Rule laid down in the Supreme Court decisions, which, we must respectfully follow.

62. We are constrained to observe that as in the earlier judgments, namely, Percentile case (supra) and Viraj Maniar (supra) , even in this matter the State has failed to substantiate its plea that the SSC Board students are at a disadvantage. We have reproduced the statements made in the affidavit in reply precisely for this reason. The first affidavit of the State very clearly in paragraph 3 states that the decision was taken considering disadvantage faced by its students. For the disadvantage to be substantiated, the State was aware, that something more should have been brought on record. We are sorry to hold that the State has once again failed to substantiate and prove its case of disadvantage to SSC Board students. The Board may state anything in its affidavits, but the State's stand is clear when it sets out the plea of disadvantage. It has been earlier observed that some distinction in the subjects and the manner of marking is not enough to substantiate this plea. It has been very categorically held by two Division Benches of this Court that the plea of disadvantage to SSC students is not substantiated by placing only such figures and details of subjects. Once Regulation 79(1) is not amended, then all are eligible, irrespective of the Boards to which they belong, for admission to Junior Colleges affiliated to Respondent No. 4 Board. If the State feels that there was disadvantage to SSC students which necessitates and warrants giving advantage only to them, then the necessary and relevant material should have been placed before us. This is not a case where the Petitioners can be called upon to discharge a burden of proving the contrary. The Petitioners have come to the Court with a clear assertion that there is discrimination writ large in the Government action. They have set out the necessary averments in the Petition and they have substantiated them by placing reliance on the binding judgments of this Court. They have pointed out and which is not denied that these decisions are not set aside or reversed by the Hon'ble Supreme Court. On the other hand, it is conceded that the State accepted the earlier judgments of this Court by not challenging them till date. Once this is the stand of the Petitioners, then it was incumbent upon the State to meet their pleas and place before the Court necessary material in support of its stand that the SSC Board students were at disadvantage all throughout. Having failed to do so, we see no alternative but to hold that the impugned Government Resolutions are violative of the mandate of Article 14 of the Constitution of India which treats those placed equally in an equal manner. There is no basis for the assumption and pleas of the State as noticed above. In such circumstances, we allow this Writ Petition by the following order:

ORDER

The impugned Government Resolution/Order dated 25th February 2010 and the Corrigendum dated 14th and 16th June 2010 issued by Respondent No. 1 State are quashed and set aside.

In view of the fact that we have quashed and set aside the Government Resolution dated 25th February 2010 and Corrigendum dated 14th and 16th June 2010, the Respondent Nos. 1 to 4 are directed to forthwith commence the admission process (Online admission and admission process) without adherence to the best of five policy as set out in the Government Resolution dated 25th February 2010 and the Corrigendums thereto.

Needless to state that the on line admission process will commence and shall be completed without in any manner applying Rule 8 as set out in the Brochure which is issued by the State of Maharashtra and particularly Respondent No. 1. Further needless to add that Respondent Nos. 1 to 4 shall make the necessary modification/ changes in the mark list of the examination of the SSC students held in March­April 2010.

Rule accordingly made absolute in the aforesaid terms.

In view of the disposal of the Writ Petition, nothing survives in Notice of Motion No. 325 of 2010 and the same is disposed of accordingly.